

January 2019

Mr. David Ross

Assistant Administrator

Office of Water

USEPA

1200 Pennsylvania Avenue, NW

Washington, DC 20460

Dear Assistant Administrator Ross,

The Maryland Department of the Environment (MDE) thanks you and your staff for the opportunity on December 6, 2018 to participate in the Clean Water Act (CWA) 404 (g) Rulemaking Pre-Proposal State Engagement Meeting in Washington DC. This letter is in follow-up to that Meeting.

MDE was pleased to hear you reinforce the Administration's goal of revising the 404 (g) regulations in order to facilitate State assumption of the CWA 404 Program. I recognize that organizations representing states, such as The Association of State Wetland Managers and the Association of Clean Water Administrators, will also be sending comments to the U.S. Environmental Protection Agency (USEPA), but I expect that those comments will be more general in nature. MDE, in making its comments today, is being as specific as possible—from one State's perspective—as to changes that are needed in the 404 (g) regulations if the Administration wants to meaningfully advance State assumption of the 404 Program and is committed to thoughtfully lowering regulatory barriers to State assumption while still ensuring compliance with CWA statutory provisions.

MDE has carefully reviewed the existing 404 (g) regulations as well as the statutory provisions of the CWA pertaining to 404 assumption with an eye toward making specific recommendations for regulatory changes that comport with the statutory construct. A general observation is that the existing 404(g) regulations contain a number of "administrative" provisions which are not mandated by the actual language of Section 404 of the CWA, and thus, USEPA has great latitude to reconsider these provisions in order to facilitate State assumption. MDE strongly encourages USEPA to undertake a careful review of the existing 404 (g) rules against the CWA 404 language in order to clearly identify provisions in the regulations which

are not statutorily mandated but which have, perhaps unintentionally, made it very difficult for States to obtain approval of their Programs in a timely manner.

For example, Subpart B, Program Approval, requires that any State that seeks approval of a 404 Program submit four items that a State has complete control over: (1) Governor's letter; (2) Program Description; (3) Attorney General's Statement; and (4) Copies of all applicable State statutes and regulations. However, it also requires that a State submit a Memorandum of Agreement (MOA) between the State and the USEPA Regional Administrator (RA) and a MOA between the State and the Secretary of the Army acting through the Corps of Engineers (ACOE). A State submission is not considered complete under the current regulations without all of these component parts—and therefore the 120 day statutory timeframe for USEPA action on an assumption package does not commence until all of these items are provided in a State submission.

Although I believe that it is "good government" for USEPA and the ACOE to develop MOAs with a State to address implementation issues associated with State assumption, I do not see a requirement in the CWA Section 404 that MOAs be part of the submission, and, the truth is that a State has no control over the timing of the completion of such MOAs. I am concerned that if an ACOE District Office is less than enthusiastic about State assumption, the District Office could delay indefinitely the signing of a MOA. MDE recommends that USEPA remove from the list of the elements of a program submission the requirement for signed MOAs with the RA and ACOE. Rather, MDE recommends that USEPA include the need for these MOAs, with regulatory deadlines and consequences if deadlines are not met, under a new section covering implementation.

A second example, Subpart B, Program Description, requires that a complete Program Description provided by the State include "a description of the waters of the United States within a State over which the State assumes jurisdiction under the approved Program; a description of the waters of the United States within a State over which the Secretary retains jurisdiction subsequent to Program approval; and a comparison of the State and Federal definitions of wetlands." The section includes a "Note" stating that "States should obtain from the Secretary an identification of those waters of the U.S. within the State over which the ACOE retains authority under section 404(g) of the Act". A State submission is not considered complete under the current regulations if the State's Program description does not include a description of assumable and non-assumable waters or the ACOE's identification (list) of those waters of the U.S. within the State over which the ACOE retains authority.

The lack of a list from the ACOE or a description provided by the ACOE of the waters of the United States within a State over which the Secretary retains jurisdiction subsequent to Program approval can preclude the State from submitting its application because an argument can be made that the State's Program Description (which is required) is incomplete. An incomplete Program Description means that the State Program Submission is incomplete and thus the 120 day statutory clock for an USEPA decision does not start. A State has no control

over the timing of the ACOE providing its list of non-assumable waters or its description of non-assumable waters and thus, the ACOE through inaction can delay indefinitely the State's submission.

Accordingly, MDE recommends that USEPA revise 233.11 (h) as follows:

(H) A statement affirming that the State is assuming jurisdiction over waters of the United States within the State other than those waters which are presently used or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark or mean higher high water mark on the west coast, including wetlands adjacent thereto **OR** if the Secretary has identified those waters of the U.S. within the State over which the Corps retains authority at the time of submission, this list shall be included in the State's submission as part of the Program description.

The above examples are but two important examples of many opportunities that exist to modify the existing USEPA regulations governing assumption in order to facilitate the process, while staying consistent with statutory intent. MDE has attached a complete set of recommended regulatory changes which it hopes USEPA will consider as it completes its pre-proposal deliberations.

MDE is pleased that USEPA convened the stakeholder meeting in Washington, DC in December and solicited from the States follow up comments/recommendations in writing. MDE believes that the 404 (g) rulemaking efforts should continue to actively engage states and tribes. The opportunity to continue to comment and provide meaningful input will be important to ensuring that the proposed regulations achieve their intended purpose. In the end, the states will judge whether USEPA's proposed changes vis-à-vis the 404(g) regulations will actually make a difference.

Thank you again for the December 6 meeting and this opportunity to follow-up with more specific comments and recommendations.

Respectfully,

Lee Currey?

Ben Grumbles?

Cc: ASWM

ACWA

ECOS